

DEKIENZO AND WILLIAMS, P.L.L.C.
State Bar #00510200
3681 N. ROBERT ROAD
PRESCOTT VALLEY, AZ 86314
TEL.: (928) 759-5572
FAX: (928) 759-5573
Email: yavapailaw@hotmail.com
Craig Williams
Attorney at Law

CLERK OF COURT
YAVAPAI COUNTY, ARIZONA
2010 DEC 30 PM 4:41
CLERK OF COURT, CLERK
BY: **A CASCIO**

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI**

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN DEMOCKER,

Defendant.

) **1300CR201001325**
)
)
)
) **OBJECTION TO NOTICE OF**
) **CHANGE OF JUDGE**
)
) **(Hon. David Mackey, and/or Robert**
) **Brutinel, Presiding Judge, Hon. Warren**
) **Darrow)**

The Defendant, by and through undersigned counsel, pursuant to Rule 10.2, of the Arizona Rules of Criminal Procedure, hereby objects to the State's Notice of Change of Judge. For the following reasons, the state's Notice of Change of Judge should be denied and the case re-assigned to Judge Darrow.

The state filed its Notice of Change of Judge on December 16, 2010, at 10:45 A.M. The state noted on page 2 of its Motion that "COPY of the foregoing mailed this 16th day of December, 2010, to," then listed several parties including Greg Parzych (counsel for the Defendant, and Counsel undersigned. However, as of this date, *neither* of the Defendant's attorney's has received a copy of the Notice of Change of Judge from the state. The Defense

¹The day is handwritten on the document.

found out about the Notice of Change of Judge at 6:45 p.m., on Friday, December 17, 2010, after checking the e-mails from that day. At 3:37 p.m., we had received an e-mail from the Yavapai County Clerk's Office, via Rita Storms (RLStorms@courts.az.gov), which had an attached *Order* – but no Notice of Change of Judge – noting that the matter had been assigned to the Presiding Judge for reassignment. The following Monday, December 20, 2010, we called the clerk, the state, and the Court to attempt to get a copy of the state's Notice of Change of Judge.

Rule 35.1, Arizona Rules of Criminal Procedure, allows 10 days to file a response to any motion. Rule 1.3, Arizona Rules of Criminal Procedure, adds 5 days to the time period in Rule 35.1 for any motion that is not hand-delivered. The state's December 16, 2010 Notice of Change of Judge was not hand-delivered to the Defendant, nor, as noted above, delivered at all. However, we were able to get a copy on Monday, December 20, 2010 via fax from the state (after we called and asked for it). Thus, per the above-cited Rules, using the filing date, December 31, 2010² would be the 15 day deadline to respond, but using the date of the receipt of the Notice, January 4, 2011 would be the 15 day deadline to respond. Because this Objection has been filed on December 30, 2010, it is timely under either analysis.

There are several reasons why the state's Notice of Change of Judge should be denied and the case re-assigned to Judge Darrow.

1) **An Improper Second 10.2 Notice.**

The state previously had filed a Notice of Change of Judge in CR2008-1339, on November 7, 2008, which is the *same* murder case as the above-captioned matter. The new

²Because this is a holiday, the following Monday would be the actual due date.

Indictment in V1300CR201001325,³ from a grand jury hearing on December 10, 2010, was merely an improper *joinder* of two cases, CR2008-1339 (the murder case) and V1300CR201080461 (the “e-mail case”), with an improperly joined additional count, Count III “Fraud Schemes,” re: the “Virginia Carol Kennedy Testamentary Trust,” which is alleged to have occurred “on or between August 2008 through October 2009. Count III is not based on newly discovered evidence.

Per Rule 10.2, each side is only entitled to *one* notice of change of judge. Rule 10.2 is to be reviewed with strict construction:

Arizona is in the minority of states that permit peremptory changes of judge in criminal proceedings. See generally W. LaFave and J. Israel, 2 Criminal Procedure § 21.4(d) (1984). Further, our supreme court has cautioned that “any provision relating to disqualification of judges must be given strict construction *to safeguard the judiciary from frivolous attacks upon its dignity and integrity and to ensure the orderly function of the judicial system.*” State v. Perkins, 141 Ariz. 278, 286, 686 P.2d 1248, 1256 (1984), overruled on other grounds, State v. Noble, 152 Ariz. 284, 731 P.2d 1228 (1987). The impartiality of judges is presumed. *Id.*; see also State v. Rossi, *supra*; State v. Menard, 135 Ariz. 385, 661 P.2d 649 (App.1982). *A construction which would expand the availability of peremptory changes of judge would be inconsistent with these principles.* Accordingly, we hold that a defendant who has exercised his right to a change of judge following withdrawal of a guilty plea pursuant to Rule 17.4(g) has exercised his only peremptory challenge, and is not entitled to an additional change under Rule 10.2.

Fiveash v. Superior Court of Arizona, 156 Ariz. 422, 425, 752 P.2d 511, 514 (Ariz.App.,1988, italics added).

Thus, since the state already filed a 10.2 Notice against Judge Hess, they are not entitled to another 10.2. In this case, there had been a mistrial, and there have been subsequent substantive hearings. *Infra*. There was a subsequent-to-the-mistrial motion for change of judge

³Count II, imported from CR2008-1339, has been slightly altered to add a “D.V.” tag, merely by including A.R.S. §13-3601.

for cause filed by the state. *Infra*. Then, the state went back to the grand jury on December 10, 2010, *Infra*, for an all-in-one Indictment, presumably seeking a fresh time clock for Rule 10.2 purposes, and for carte blanche on future motions, evidentiary rulings (without motions for reconsiderations to be filed), and to *obliterate the law of the case*.

The case the state will no doubt rely on is Godoy v. Hantman, 205 Ariz. 104, 67 P.3d 700 (Ariz.,2003), for the proposition that a new indictment begins a separate matter, and thus, the right to a peremptory change of judge applies as if no prior criminal action had been filed. As noted above, and below, the legal history of this case is easily distinguished from Godoy. Godoy simply does not apply to this case. In this case, not only was the first case not dismissed before the “new” Indictment was filed, but the state filed its Notice of Change of Judge before on the new case before the old case was even dismissed. The state’s Notice was premature, and therefore has no legal effect. The Godoy Court stated:

This case presents the question whether each party receives a new opportunity to file a notice of a peremptory change of judge when the state refiles a criminal matter previously dismissed without prejudice. We conclude that a new indictment begins a separate matter and that the right to a peremptory change of judge applies as if no prior action had been filed.

The State charged Defendant Godoy with ten counts of perjury in violation of Arizona Revised Statutes (A.R.S.) section 13-2702 (2001). In May 2001, a grand jury indicted Godoy on nine of the ten counts. In June 2001, Judge Howard Hantman received the assignment of Godoy's case. Neither the State nor Godoy requested a change of judge, as permitted by Rule 10.2 of the Arizona Rules of Criminal Procedure.

Pursuant to Rule 12.9.a, Godoy moved for a new finding of probable cause. Judge Hantman granted the motion and remanded for a new finding on December 11, 2001. *When the State did not recommence grand jury proceedings within fifteen days, Judge Hantman dismissed the case without prejudice under Rule 12.28.*

Godoy v. Hantman, 205 Ariz. 104, 105, 67 P.3d 700, 701 (Ariz.,2003).

There was no issue concerning a 12.9 motion in this case. There was no failure by the state under Rule 12.28. Clearly, the procedural history of Godoy is inapplicable here. In addition, in this case there were contested matters before the Court. Even Godoy noted the importance of the existence of contested matters:

Rule 10.4.a provides: "A party loses the right under Rule 10.2 to a change of judge when the party participates before that judge in any contested matter in the case, an omnibus hearing, any pretrial hearing, a proceeding under Rule 17, or the commencement of trial." Ariz. R.Crim. P. 10.4.a.

Id., fn. 5, pg. 107, 703.

The Godoy Court cited State v. Poland 144 Ariz. 388, 395, 698 P.2d 183, 190 (Ariz.,1985), for cases with procedural histories such as the instant case:

Furthermore, by participating in these hearings, defendant waived his peremptory challenge rights pursuant to Rule 10.4(a), Arizona Rules of Criminal Procedure, 17 A.R.S., which provides in pertinent part that "[a] party loses his right under Rule 10.2 to a change of judge when he participates before that judge in any contested matter in the case, [or] * * * any pretrial hearing * * *." ***In other words, if a party participates in a hearing which involves a contested issue of law or fact, the right to a peremptory challenge of the judge is waived.*** Itasca State Bank v. Superior Court, 8 Ariz.App. 279, 445 P.2d 555 (1968). The hearings in this case involved contested issues insofar as the parties disagreed on the important question of whether the requested dismissal would be with or without prejudice.

State v. Poland, 144 Ariz. 388, 395, 698 P.2d 183, 190 (Ariz.,1985), cited in Godoy v. Hantman, 205 Ariz. 104, 107, 67 P.3d 700, 703 (Ariz.,2003) (Emphasis added).

Thus, because the state participated in substantive hearings, its 10.2 rights were waived.

A further timeliness issue – independent of the other timeliness issue raised in this Motion – rests on the fact that Judge Darrow's "Order Reassigning Matter" was filed on December 17, 2010, at 11:16 a.m., ***two hours before*** the "Order of Dismissal Without Prejudice" was filed (at 1:19 p.m., on December 17, 2010). (See: Orders, attached). In fact, the State's

Notice of Change of Judge, which was filed on December 16, 2010 at 10:45 a.m., was filed a day *before* the first case was even dismissed. It should be noted that the issue of dismissing the cases was requested by the Defense at the December 13, 2010 Hearing – but not granted at that time – and the state was given 10 days to file those motion(s). It is important to note that at the time the Defense requested the dismissal(s), the Defense had stipulated that “pre-existing motions still exist” – trying to preserve the law of the case.

The fact that the matter had been under the legal posture clearly stated in Judge Darrow’s “Order Reassigning Matter,” *before the cases were dismissed*, is evident by Judge Darrow’s handwritten note on the “Order of Dismissal Without Prejudice,” which stated:

“and in accordance with Rule 10.6 of the Arizona Rules of Criminal Proc.”

Rule 10.6 states:

When a motion or request for change of judge is timely filed under this rule, the judge shall proceed no further in the action, except to make such *temporary orders* as may be necessary in the interest of justice before the action can be transferred to the presiding judge or the presiding judge's designee. However, if the named judge is the presiding judge, that judge shall continue to perform the functions of the presiding judge. (Emphasis added).

Respectfully, the “Order of Dismissal Without Prejudice” is not a “temporary order” as contemplated by Rule 6. Plus the Defense was not given a copy of the Motion to Dismiss, nor a chance to respond to the motion before it was granted. Thus, the timing of the orders distinguish this case from the holding in Godoy.

The state’s Notice of Change of Judge was not timely filed.

2) **Improper Joinder and Use of Indictment Power.**

Prior to returning to the grand jury on December 10, 2010, in order for the state to be able

to use the information from any of the “new” counts in V1300CR201001325 (which occurred after the events charged in the murder case) during a new trial on the murder case, the state would have had to: a) moved to join the previous two Indicted cases and new fraud count per Rule 13.3, Arizona Rules of Criminal Procedure, or b) attempt to use Rule 404(b), Arizona Rules of Evidence (“Other crimes, wrongs, or acts”). The state knew that either choice would have been objected to by the Defense. Either choice would have required a hearing in front of Judge Darrow.

Timing is everything, however, and it is important to note on December 8, 2010 – just 8 days before the 10.2 on Judge Darrow – Judge Darrow denied (without a hearing) the state’s December 3, 2010 Motion For Change of Judge (for cause, per Rule 10.1,) against Judge Lindberg. Then, just two days later, on December 10, 2010, the state bypassed any hearings on Rule 13.3, Arizona Rules of Criminal Procedure and Rule 404(b), Arizona Rules of Evidence by returning to the grand jury for an all-in-one indictment. The grand jury obliged.

It is unnecessary for the Defense to guess at the motivation of the state for its flurry of maneuvers to get Judge Darrow off the case. As mentioned above, destroying the law of the case is a very transparent motive. It also certainly appears to be forum shopping, which is improper.

The right to an impartial judge does not include the right to a judge of one's own choosing.

State v. Moya, 136 Ariz. 534, 538, 667 P.2d 234, 238 (Ariz.App.,1983).

It is also a violation of the one-change-of-judge-per-side rule. That rule was amplified by the fact that the state had *just filed* its 10.1 motion, which was promptly and correctly denied.

At the oral argument upon the return of the writ in this matter, petitioner conceded that the County Attorney had exhausted the right to a peremptory challenge when

he asked Judge Deddens to step aside. From a reading of the record we are in agreement with the County Attorney's candid statement on this point, and we hold that *the County Attorney had exhausted his peremptory right when Judge Deddens was asked to disqualify himself, and that the County Attorney therefore had no peremptory right to challenge respondent Judge Collins.* (Citations omitted).

State ex rel. Riley v. Collins 7 Ariz.App. 36, 37, 435 P.2d 871, 872 (Ariz.App. 1968, Italics added).

3) **Hearings on Substantive Issues, and Previous Trial**

Prior to the “new” Indictment, there have been many substantive hearings presided over by Judge Darrow on cases CR2008-1339 and V1300CR201080461. In addition, Judge Darrow had presided over the trial on CR2008-1339, including up until the mis-trial. There had been a significant hearing on November 23, 2010 on CR2008-1339 and V1300CR201080461. At that Hearing, counsel undersigned had addressed the difficulty of assimilating and organizing the massive case. The Court allowed two “interveners” to address the Court on the issue of the sealed records – *over Counsel undersigned’s objection* – and for the state and Counsel to address their issues. These were substantive hearings on the issue of the sealed records, which occurred on November 23, 2010 and December 13, 2010, per CR2008-1339 and V1300CR201080461. In addition, the issue of the Defendant’s jail conditions had been repeatedly addressed. On December 1, 2010, the Court issued a “Supplement” to the November 23, 2010 Minute Entry, in which *the Court made specific findings*. None of the issues addressed on November 23, 2010 and December 13, 2010 could be considered trivial, nor have they been resolved.

There was then a hearing on December 13, 2010 on all cases, CR2008-1339, V1300CR201080461, and V1300CR201001325. At that Hearing, the Defense addressed several of the same issues which were addressed at the November 23, 2010 Hearing. Counsel moved the

Court to assign V1300CR201080461 to Judge Darrow. It was so ordered⁴.

As of that December 13, 2010 Hearing, in which substantive issues were addressed, there had been no motions to dismiss by the state of either CR2008-1339 or V1300CR201080461. Until Counsel for the Defendant raised the issue, the new Indictment had not been mentioned. No Notice of Change of Judge had been filed – or referred to.

No, the state was laying in wait, and counting on the new Defense Team being overwhelmed.

4) **Grand Jury Transcript**

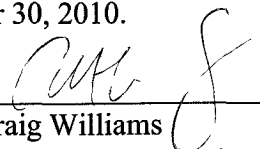
If in fact, if the presentation to the grand jury was just a re-statement that probable cause had previously been found by a separate grand juries as to the charges in CR2008-1339 (murder case), and V1300CR201080461 (the E-mail case), then Counsel requests permission to supplement this Motion.

Conclusion

This abuse of Rule 10.2 significantly frustrates its purpose. The state cannot use the grand jury to wipe out the law of the case and to buy a new 10.2 notice. Where would that ever end? Every time the state received a ruling they didn't like, they could head back to the grand jury. Then, after getting a new Indictment, they could get rid of another judge. It took Judge Darrow a long time to come up to speed on this case. It will take the new attorneys a long time. The state's untimely and improper 10.2 Notice of Judge Darrow is causing needless and unjustified delay. For the above stated reasons, the state's Notice of Change of Judge should be denied and the case remanded to Judge Darrow.

⁴The 12-13-2010 Minute Entry incorrectly identified CR2008-1339 as the case that was assigned to Judge Darrow on that date. We called the court reporter and confirmed the information printed here. A partial transcript confirming this information has been ordered.

RESPECTFULLY SUBMITTED on December 30, 2010.



Craig Williams
Attorney for Defendant

Copies of the foregoing delivered / placed in box on this date to:

Hon David Mackey, and/or Robert Brutinel, Presiding Judge of the Superior Court, Hon. Warren Darrow, Judge of the Superior Court.

Joe Butner, Jeff Paupore, Yavapai County Attorney's Office

Greg Parzych, via e-mail.

The Defendant

By



✓/0

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI**

FILED
11:16 O'Clock a M ✓
DEC 17 2010
JEANNE HICKS, Clerk
BY Dita Storms
Deputy

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NUMBER: P1300CR201001325

Date: December 17, 2010

TITLE:

COUNSEL:

STATE OF ARIZONA

Yavapai County Attorney

(Plaintiff)

(For Plaintiff)

vs.

STEVEN CARROLL DEMOCKER

Craig K. Williams, Esq.
DeRIENZO & WILLIAMS

(Defendant)

(For Defendant)

ORDER REASSIGNING MATTER

Notice of Change of Judge has been filed herein.

IT IS ORDERED this matter is assigned to the Presiding Judge for reassignment.

IT IS FURTHER ORDERED the case management conference set for January 24, 2010,
is vacated.

cc: Case Flow Manager w/file

Office of the Yavapai County Attorney

255 E. Gurley Street, Suite 300

Prescott, AZ, 86301

Phone: (928) 771-3344 Facsimile: (928) 771-3110

1 JOSEPH C. BUTNER, SBN 05229

Deputy County Attorney

2 YCAO@co.yavapai.az.us

3 Attorneys for STATE OF ARIZONA

FILED

1:19 O'Clock P M

DEC 17 2010

JEANNE HICKS, Clerk

BY Rita Storms
Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

8 STATE OF ARIZONA,

CAUSE NO. P1300CR20081339

9 Plaintiff,

10 vs.

ORDER OF DISMISSAL WITHOUT
PREJUDICE

11 STEVEN CARROLL DEMOCKER,

12 Defendant.

14 *and in accordance with Rule 10.6 of the Arizona Rules*
 Upon Motion by the State of Arizona, IT IS ORDERED: *of Crim. Proc.*

15 Dismissing P1300CR20081339 against STEVEN CARROLL DEMOCKER without
 16 prejudice.

17 All Pending motions under P1300CR20081339 are transferred to P1300CR201001325.

18 All exhibits associated with P1300CR20081339 are to be returned to the submitting party
 19 by the Clerk of the Court.

21 DONE IN OPEN COURT this 17th day of December, 2010.

22 

Warren R. Darrow

Judge of the Superior Court

23 e-☒ County Attorney
 24 e-☒ Victim Services
 25 e-☒ Clerk of Court
 26 e-☒ Court Admin
☒ Dispo Clerk
☒ Exhibit Clerk

e-☒ DeRienzo & Williams, (counsel for defendant)
☒ Greg Parzych, (counsel for defendant)
e-☒ Steptoe & Johnson, (for Western News & Info)
e-☒ John Napper, (for Renee Girard)
e-☒ Trautman Dupont, (Victims-Charlotte & Katherine Democker)
☒ In Pro Per (William E. Williams-Interested Party)

4 (4)
 Total 8 (8)